PERFECTION OF THE TORRENS SYSTEM.

The Torrens System, in its inception in Australia, was a Revolution. It originated, not with a lawyer, but with a layman — a revolutionary Irishman. It was not designed to please lawyers, but to bring relief to business men who felt themselves manacled by chains of title clanked from generation to generation by the captives of harsh and hoary laws. A leader arose who showed the people how to burst the lingering bonds of feudal slavery. Of course it involved battle, it involved war. The struggle was fierce from the beginning, and has lost but little of its intensity with the course of years. No victory has been won without a life and death struggle; but there have been no defeats, and each victory won has led to a wider conquest.

And so, the Torrens System in America is not only a revolution, but an evolution. Its progress has been attended with the accustomed turmoil of battle and its enemies have forged new weapons of offense drawn from the armories of our written constitutions. The conflict has been bitter everywhere, the strife has been prolonged; but the triumph has steadily assumed greater and greater proportions. All sorts of tactics have been employed by the old guard, in opposition. Every legislative delay possible has been interposed, and when action has become inevitable then resort has been had to insidious amendment to make the act inefficient. Finally, when the will of the people has been partially enforced by the passage of a *quasi* Torrens Act, the power of the courts has been invoked to annul it. Failing in this, the effort has then been made to discredit the whole business by gloating over the cautious and deliberate progress of the act, a thing not wholly to be deprecated, caused by the machinations of its adversaries, the prejudice of lawyers against innovations, and the conservatism of the public. And yet, out of all this strife and these natural birth-pangs, the Torrens principle has emerged with a widening circle of friends and adherents. The violence of its opponents and the persistency of their attacks have only served to increase the loyalty and number of its supporters. So that today fourteen States have adopted it; the Federal Government has approved it for

Hawaii and the Philippine Islands; it is pending in Congress for the District of Columbia and an active campaign is being waged in a number of other States for its adoption this winter. And it takes no prophetic eye to see that it is destined to play an essential part in the practical administration of the Federal Farm Loan Act in its beneficent operations throughout the United States. For rural credits can only be obtained on first mortgages, and the borrower who has a Torrens Certificate can show his title without delay and secure a Federal loan without the cost of title examination. This point has been already expressly decided by the Federal Farm Loan Board.

Scope of This Article.

It must not be supposed from the title of this article, that perfection is claimed for any one of what are called the Torrens Acts in the United States. Nor is it intended to imply that the Australian Torrens System itself is perfect. It would be absurd to claim absolute perfection for any human device. But, so far as the writer has been able to discover, the Torrens System is superior to any method yet devised by the wit of man for dealings with land; and it is believed that the principles of this system are being brought by the genius of the American Bar to a condition of practical perfection approaching the theoretical perfection of the system. For the American system enjoys a distinction over the Australian system, the latter being purely an administrative system while the former is a judicial system. It is the purpose of this article to emphasize this superiority of the American system, and to indicate the steps that have been taken for its perfection.

Pivotal Points.

An article appeared in the Yale Law Journal of February 1915, Volume 24, pp. 274-285, entitled "Pivotal Points In The Torrens System." Its author was Hon. William C. Niblack, an able member of the Chicago Bar and Vice President and Trust Officer of the Chicago Title and Trust Company. This Company occupies a position of peculiar eminence in the title field of Chicago, because it possesses copies of records and abstracts concerning Chicago titles rendered of priceless value by the

destruction of the public records in the great fire of 1871. It has a capital of $7,000,000 and a surplus of $3,500,000, and it both examines and insures titles. Naturally, it fought the adoption of the Torrens System in Illinois, and has constantly opposed its operation. Mr. Niblack has long been identified with this Company, and has consistently antagonized the Torrens System in Illinois and elsewhere in the United States. He is firmly persuaded that the principles of the Torrens System can never be operated with success in America, and has challenged the writer of this article to answer his "Pivotal Points" paper. In one communication, referring to the fact that he had been unable to induce anyone to cross swords with him, he says: "Everybody refers me to you;" and in another he says: "You see I have come back to you again as the one hope of getting an acceptance of the challenge for discussion, which I made in the article." To enter the lists with Goliath has always been a fearful undertaking; but in this instance, as of old, he who is called to take the part of David enters the combat with a stout heart, not relying upon his own ability but upon the excellence of his cause.

PIVOTAL ADMISSIONS.

And in the beginning, we take up the gage on five *pivotal admissions* which, when followed to their logical conclusions, would seem to yield the issue. For on page 276 Mr. Niblack says:

> "Undoubtedly it is competent for the legislature to declare that no title to registered land shall pass from a transferor to a transferee unless and until the transfer has been registered, just as it may declare that no title shall pass from a grantor to a grantee of unregistered land unless and until the deed is recorded in the recorder's office."

Now if this power be conceded to the legislature, what more is needed to make the registration of title final and conclusive in every case? And that such registration must be considered conclusive, is shown by a second admission on page 281, where he says:

"Nevertheless, since the decision in *People* v. *Simon, supra,*

(1898), many States have passed Torrens Acts containing provisions for the issue by the registrar of conclusive certificates on transfers of registered lands, and the courts in passing on the constitutionality of these acts have ignored the legal questions involved in them."

This is a sweeping confession of the futility of attacks on the Torrens Acts. For if astute counsel, in test cases, have not been able to induce the courts to declare Torrens certificates *inconclusive,* what is the use of an academic discussion of that question? And if the courts had persisted in ignoring the argument that such certificates are not conclusive, the fact that they are conclusive would have been practically settled in a very satisfactory manner. But the courts have not ignored the legal questions involved in transfers of registered land. For it has been expressly decided in Minnesota, in a case in which the title of an innocent purchaser of registered land was upheld against an unrecorded mortgage fraudulently concealed by the applicant in proceedings for original registration:

"It is difficult to see what would remain of the indefeasible character of a Torrens title, if the decree is open to collateral attack as against one who purchases in good faith for a valuable consideration, and with nothing to put him on inquiry as to fraud on the part of the applicant. *Henry* v. *White,* 123 Minn. 82; *State* v. *Rees,* 123 Minn. 397."

And in construing the Washington Torrens Act, the Supreme Court of that State has said:

"Our construction of this section is in keeping with the obvious purpose of the Torrens Act to create an absolute presumption that the certificate of registration in the registrar's office at all times speaks the last word as to the title, thus doing away with secret liens and hidden equities. * * * This is the distinctive feature, the vital principle of the Torrens System. For the courts to refuse to recognize and enforce it would be to emasculate the law, and by construction make it not the Torrens System of land titles, but a mere change in the *form* of the record, a mere modification of the recording act." *Bruce* v. *Superior Land Court,* 65 Wash. 681.

A third admission occurs on p. 284, where it is stated:

"A contract of insurance or guaranty of title is one of indem-

> nity in case the title shall fail, but under the Torrens System the State through its declaration of the indefeasibility of a registered title establishes it so that it can not fail."

Again, if it be conceded that the State Torrens Acts give indefeasible titles, established so that they cannot fail, what more could be desired? Every cloud must vanish from the horizon of such titles, and they must be accepted at their face value.

The fourth admission occurs on the same page, in this language:

> "The purpose of registering titles, instead of the evidences of title, is two-fold, to give certainty of title to the person who is put on the list of owners of registered estates by doing away with the necessity for any examination of title back of the last certificate."

This is a clear statement of the notable advantages of the Torrens System. It reiterates previous admissions that this system makes titles certain and furnishes conclusive certificates of title.

The fifth admission occurs on page 285, where it is stated:

> "A system by which persons by inspection of the register may ascertain absolutely who holds title to a particular piece of land, and what burdens, if any, are on it, though more complicated than a mere statement of its elementary principles might indicate, is worthy of adoption if it can be created under our laws."

This is a concession to be noted. And the fact that 14 States have already adopted the principles of the Torrens System, coupled with the fact that all existing acts have withstood every assault yet made upon them in the courts, give sufficient assurance that the system "can be created under our laws."

PIVOTAL CONFUSIONS.

In the next place, we desire to call attention to certain pivotal confusions in the article under discussion. The first occurs on page 275, where the author refers to the powers and duties of the registrar and "the effect of his register." And in the next sentence this confusion is emphasized by the words "his register. his certificate of title, shall be conclusive evidence of the

ownership of the registered estate in all courts and in all places." This is a loose use of language, and ignores that evolution of the American acts to which reference has been made. For in the best of these acts, and particularly in the Uniform Land Registration Act to which references will hereafter be made in this paper, it is provided that the registrar shall always act "under the direction of the court." It is therefore inaccurate and confusing to speak of the register as "his register," or to speak of a certificate of title as "his certificate of title." The register is the register of that court, and certificates of title are always certificates of the court.

The second confusion occurs on the same page in this language:

> "All Torrens acts provide in effect that an officer charged with the duty of making registrations shall consider any title to land submitted to him for the purpose of registration, and that he shall make a public record of the status and condition of the title according to his decision and judgment."

One has but to read the Massachusetts Act and the Uniform Land Registration Act, even cursorily, to observe how wide of the mark is this statement. For the judicial character of all the processes of registration are plain and prominent throughout these acts. Mr. Niblack, here and elsewhere throughout his paper, breeds confusion by not distinguishing between the Australian Torrens Acts and the American Acts. And too often he confines his view to the original Illinois Act which was declared unconstitutional in *People* v. *Chase,* and to the present Illinois Act which is inferior in many of its provisions to the Massachusetts Act and particularly to the Uniform Land Registration Act.

A third confusion occurs on the same page, 275, in a statement which contrasts registered estates with legal and equitable estates. All equitable estates as well as legal estates may be registered. But of course it would be a contradiction of terms, under the registration system, to allow the existence of any estate except registered estates. When one fails to record the evidences of his title under the old record system, which some

are disposed to laud so highly, he may lose his title and property absolutely. But under the beneficent provisions of the Uniform Land Registration Act, if a genuine claim of title be for any reason unregistered, the owner of the outstanding unregistered claim at least has the satisfaction of compensation out of the Assurance Fund to the full extent of the value of the property lost.

A fourth confusion occurs on page 278, where the discussion of the first Illinois Act of 1895 and the citation of the Victoria case add nothing to the theme. For a defunct Act surely cannot contain any live pivotal points in a system which has been firmly reëstablished by a subsequent Act which has withstood every assault made upon it. And the Victoria case is without application, inasmuch as it has been held by the Supreme Court of Illinois in *People* v. *Simon,* that the duties of the registrar under the second Illinois Act are not judicial but merely ministerial.

A fifth confusion occurs on page 280, where complaint is made that no notice is given "to persons who may be interested in the transfer of land from one registered owner to another." In discussing the principles of the Torrens System it is illogical to speak of persons other than registered owners having any interest in the transfer of land from one registered owner to another. All such persons were disposed of at the time of original registration. It is impossible logically to conceive of any third person entitled to notice at the time of "the transfer of land from one registered owner to another." The time for notice was when such transferor became the registered owner, and not afterwards. For you are dealing with the title itself every time, and all questions are settled at the time of each registration. All persons in interest being then brought before the court by the surrender of the outstanding duplicate certificate accompanied with authority for the transfer then to be made. Therefore, when one becomes a registered owner he gets such title as is shown by his certificate, and his rights are definitely settled thereby to the exclusion of the rights of all other persons.

A sixth confusion occurs in the statement on page 281, that

"A certificate signed by an administrative officer is not necessarily in and of itself conclusive evidence of the matters of fact and of law set forth and declared therein." For the certificate does not derive its character from the signature of the administrative officer but from the adjudication of the court under whose direction he must always act. It is the judgment of the court that is conclusive, and it is competent for the legislature to say how that judgment may be evidenced and attested, provided it does not undertake to infringe the prerogative of the Judiciary. In the Uniform Registration Act and other American Torrens Acts, in declaring that the certificates shall be conclusive evidence of the facts stated therein, there is no attempt on the part of the legislature to require the courts to renounce their vital functions or to forego judicial investigation. On the contrary, the certificates are the result of untrammeled judicial action. The legislature does not attempt, in the language of Dean Wigmore, "to make a rule of conclusive evidence, compulsory upon the Judiciary" (Wigmore on Evidence § 1353); it simply declares that the certificates of title issued by authority of the courts under these Land Registration Acts shall be accepted as judicial records and be as final as the judgment roll. In other words, each certificate of title furnishes an example of what Dean Wigmore designates as "the integration of a transaction," or its reduction to a single document. (Wigmore on Evidence § 2450).

The effect of the authorities cited by our author in this connection, insofar as they are pertinent to the American Torrens Acts, is illustrated by one of them under the style of *People* v. *Rose,* 207 Ill. 352. In this case the Court said:

> "It is not, however, within the legislative power to declare what shall be conclusive evidence, as that would be an invasion of the power of the judiciary."

This merely confirms the doctrine to which we have already referred. For the rule of evidence complained of is no "invasion of the power of the judiciary," but the rule declaring what shall be the effect of judicial acts, and giving such acts their usual conclusive effect.

But we have some very direct authorities on the power of

the legislature over rules of evidence in a Torrens Act, in two leading Illinois cases. In the first, *People* v. *Chase,* 176 Ill. 165, in construing the second Illinois Torrens Act it was expressly held:

> "It being true that the law may prescribe rules of property and rules of evidence by which the title is to be shown, we see no reason why the transfer of real estate may not be made in the way contemplated."

And in another leading case, *Waugh* v. *Glos,* 246 Ill. 604, in which the same Illinois Act was attacked as unconstitutional, on account of special rules of evidence established by it, the Court said:

> "The Torrens System of Registration of land titles is different from the prevalent method of recording; the manner of bringing lands under such system must be provided by statute; the proceeding is of a different nature from the ordinary action at law or suit in chancery; *and we cannot say that the legislature acted unreasonably in providing for a rule of evidence applicable to the proceeding without extending it to all other forms of action in which the title to real estate is involved.*"

In this case, in answering another constitutional objection, the Court further said (italics ours):

> "It is claimed that the act is special because it makes special provisions regarding the statute of limitations, the *rights of purchasers* in good faith of *land registered* under the act, and other matters peculiar to the lands which are brought within its provisions. We perceive no merit in this contention. The fact that the land just registered may be conveyed and *transferred* by means different from that required as to other lands, and the necessity of a special proceeding as a foundation for the system, creates a separate class of such registered lands, *and authorizes special provisions of law on the subject, applying only to such registered lands, the owners thereof, or persons interested therein,* or to the procedure whereby the system is to be inaugurated."

It seems to us that these decisions ought to be sufficient to clear up any doubt in the mind of the gentleman from Illinois concerning the validity of certificates of title, whether original or representing subsequent registrations.

A seventh confusion premeates the discussion of the possibilities of the Ohio statute, on pages 282-3. For the judicial powers which may be conferred by law upon county recorders under the amended constitution of that state, are apparently assumed to be in conflict with the judicial powers of the courts charged with the administration of its land registration law. But it is historically plain that the constitutional amendment was passed expressly to enable the Ohio legislature to pass a Torrens Act that would certainly be free from the objection that has caused the first Ohio act to be declared unconstitutional in *State* v. *Guilbert*. Therefore it should have been assumed that the county recorders would act under the direction of the courts, and not independently thereof. But Mr. Niblack argues that the very provision which was intended to remove constitutional objections in Ohio, must result in adding to the constitutional difficulties of any Torrens Act in that State. It passes belief that the courts of Ohio will take such an inconsistent view of the situation. There are no reported decisions construing the new Ohio Act, but it may be confidently expected that, should any such constitutional questions be raised as are suggested by Mr. Niblack, they will be declared without merit by the Supreme Court of that State.

Pivotal Errors.

It remains to consider certain pivotal errors in Mr. Niblack's paper.

The first error lurks in the statement on page 274, that "the principles of the Torrens System operate only on titles which have been registered." In point of fact one of its leading principles is displayed in the original proceedings for the registration of title. This principle is that such, and all other proceedings, are proceedings *in rem*, against the land itself. One of the chief distinctions of the Torrens System is that it clears title and quiets it *against all the world*. This differentiates it sharply from all other suits to quiet title *in personam*.

The second error is found on the same page, in this statement:

> "The only cases in this country which treated of or discussed any fundamental principles of the Torrens System

are *People* v. *Chase* and *State* v. *Guilbert,* and they touched on them in a meager way."

Now it happens that these are the cases which declared the first Illinois and Ohio Acts unconstitutional, and they impressed Mr. Niblack as having gone to the foundation of the matter. But he says that the right of the registrar to register subsequent transactions involves one of the "fundamental principles" of Torrens legislation, and that any attempt on his part to do so must require the exercise of judicial functions and be violative of the Fourteenth Amendment to the Constitution of the United States prohibiting any State from depriving any person of property "without due process of law." Yet in *People* v. *Simon* (176 Ill. 165), the court in answering this very contention said, in construing the second Illinois Act, in which the processes of evolution had borne fruit (italics ours):

"*The true theory of this act,* as we understand it, is that all holders of vested rights shall be subjected to an adjudication of competent jurisdiction, upon due notice, in order that the true state of the title may be ascertained and declared, and that thereafter the tenure of the owner, the right of transfer and encumbrance, *and all rights subsequently accruing shall be determined in accordance with the rules now prescribed.* 'A state may, by statute, prescribe the remedies to be pursued in her courts, and may regulate the disposition of the property of her citizens by descent, devise, or alienation.' (3 Washb. Real Prop., 4th ed., p. 187.) 'The right of ownership which an individual may acquire must therefore, in theory at least, be held to be derived from the state, and the state has the right and power to stipulate the conditions and terms upon which the land may be held by individuals.' (Tiedeman, Real Prop., 2d ed., § 19.) *'The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer,* and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, *is undoubted.* (*Arndt* v. *Griggs,* 134 U. S. 316, 321.) *The power of the legislature in this respect* (as to changing the rules of evidence as to the burden of proof), whether affecting proof of existing rights, or as applicable to rights subsequently acquired, or to future litigation, so long as the rules of evidence sought to be established are impartial and uniform in their application, *is practically unrestricted.' (Gage* v.

Caraher, 125 Ill., 447, 455.) It being true that the law may prescribe rules of property and rules of evidence by which the title is to be shown, *we see no reason why the transfer of real estate may not be made in the way contemplated,* and why it may not be made compulsory to make it in that way, if the legislature so determines."

And in *Tyler* v. *Judges* (175 Mass. 71), the court said (italics ours):

"The ordinary business of registration is very nearly ministerial. There is no question to be raised, or which can be raised. If there is a question, either raised by any party in interest or occurring to the assistant recorder, it is to be referred to the judge for decision (§ 53). But whatever may be thought of the original act, by amendment even *the ordinary business is to be done only 'in accordance with the rules and instructions of the court.'* (St. 1899, c., 131, § 8.) *Under this amendment registration is the act of the court. The fact that it may be done by the assistant recorder under general orders when there is no question is not different from the power of the clerk to enter judgment in cases ripe for judgment under a general order or rule of the superior court.*"

Here again the process of evolution had been at work, and is noted by the court. And in this leading case we have the solemn adjudication that wherever the registrar is required to act "in accordance with the rules and instructions of the Court," every act of registration performed by him "is the act of the court." In the Uniform Land Registration Act it is repeatedly provided that all acts of the registrar shall be performed under the direction of the court. (See sections 14, 50, 57, 58, 68.)

And in *State* v. *Westfall,*[1] the court said (italics ours):

"*The registration is the act of the court.* The fact that it may be done by the Registrar, under general orders, where there is no question, is not different from the power of the clerk to enter judgment, in cases ripe for judgment, under the general order or rule of the court."

And in *Robinson* v. *Kerrigan,*[2] the court said (italics ours):

"*There is no force to the objection.* Every administrative

1. 85 Minn. 437; 89 N. W. 175; 57 L. R. A. 297, 303.
2. 151 Cal. 40; 90 Pac. 129, 132.

> officer is frequently called upon, in the discharge of his duties, to decide questions of law relating thereto. Recorders determine deeds, leases, mortgages, etc., before recording. The sheriff determines, for his own guidance, ownership of property before levying. The duties required of the Registrar by these sections are of the same nature. His decision in the matter is not conclusive. If he decides wrongfully and refuses to perform the appropriate duty in the premises, he may be compelled to act properly by a writ of mandamus, the same as any other ministerial officer who mistakes his duty under the law and refuses to perform it."

In view of these leading decisions, the statement that *People* v. *Chase* and *State* v. *Guilbert* are the only cases in this country touching "any fundamental principles of the Torrens System," is shown to be erroneous. And in this connection we may pause to note the fact that not one of the numerous cases in Illinois on this subject has been carried to the Supreme Court of the United States. In many of them it has been contended that the Illinois Act was violative of the Fourteenth Amendment, but so far as the records show not one has been appealed. Why is this? Has it been considered more discreet merely to muddy the waters, or is it conceded that appeals would be in vain?

The third error is found on page 375, in the statement that the Torrens System "is not a judicial system, but an official system." This is clearly wrong, as has been shown, so far as the American Acts are concerned. And it is contradicted in the article under discussion, as to foreign countries, by this statement on page 277: "It is evident that the act of registration is not clerical or administrative, but is judicial." It is also contradicted by the Victoria case cited on page 278, in which the registrar is declared "to discharge not merely ministerial but judicial duties." And it is contradicted a third time by this statement on page 283: "A Torrens certificate is a public register, established by a state, creating an indisputable title to the estate in land as adjudicated and entered by a judicial officer who binds the whole world by his act."

The fourth error is found on page 275 in this statement:

"Since this declaration of the indefeasibility of a registered

> title is the pith of the whole system, it seems strange that it was not even touched upon in any of the decided cases sustaining the constitutionality of a Torrens act."

Yet in *Beart* v. *Martin,* 99 Minn. 197, sustaining the constitutionality of the Minnesota Torrens act, we find this express decision:

> "We think the purpose of the statute was to create an indefeasible title in the person adjudged to be the owner, and who thus becomes the original registered proprietor."

And in *Henry* v. *White,* 123 Minn. 182, another case construing the Minnesota Torrens Act, we find this express decision:

> "The purpose of the statute was to create an indefeasible title in the person adjudged to be the owner. The basic principle of the system is the registration of the title to land instead of registering only the evidences of such title. A title is created by the decree and certificate of registration."

And in *Lochman* v. *Bookfield,* 135 N. Y. S. 261, a case construing the New York Torrens Act, we find this decision:

> "The design of the system is to vest the title holder with a certificate behind which outsiders need not look, as towards them, it is forever binding and conclusive."

And in *Crabble* v. *Hardy,* 135 N. Y. S. 119, another case construing the New York Torrens Act, we find this express decision:

> "Its object is to establish by a judgment of the court a fact once for all that the plaintiff has title so that thereafter the records need not be examined."

And in *Partenfelter* v. *People,* 211 N. Y. 355, another case construing the New York Torrens Act, we find this express decision:

> "The intention of the title registration act is to provide a new system of land registration whereby persons can ascertain by an inspection of the register, in whom the title to a particular piece of property is vested."

And in *Cape Lookout Co.* v. *Gold,* 167 N. C. 63, a case con-

struing the North Carolina Torrens Act, we find this express decision:

> "The principle of the 'Torrens System' is conveyance by registration and certificate instead of by deed, and assimilates the transfer of land to the transfer of stocks in corporations."

And in *Mfg. Co.* v. *Spruill,* 169 N. C. 618, another case construing the North Carolina Torrens Act, we find this express decision:

> "This act is a beneficial one for the purpose of settling titles to real estate and to facilitate the transfer of the same without the expense of making a new investigation and abstract of the title at each successive conveyance. It has operated most beneficially and satisfactorily in the several countries and States that have adopted it. It has not been looked on with favor by some who believe that the act will deprive them of fees for the investigation and making an abstract of titles, but it was passed at the demand of the farmers and owners of real estate to save that very expense. Its adoption was a matter of public policy committed solely to the legislative department of the Government, and with which the courts have nothing to do. But we find nothing in the act which can be construed as intending to cut off claimants of adverse titles from a full examination and decision of their claims. On the contrary, the act was intended to give, once for all, the fullest examination into all controversies over the title to the land set out in the petition, because thereafter the order of the court in such cause will be conclusive."

A fifth error is found on page 277 in the statement that "a transfer of registered land does not depend in the least on the validity of the title of the transferor, or on the validity of his instrument of transfer."

Cases of fraud are expressly excepted by the Illinois Act, and also by the Oregon and Nebraska Acts which are practically *verbatim* copies of the Illinois Act. The Minnesota Act only protects "every subsequent purchaser of registered land, who receives a certificate of title in good faith and for a valuable consideration."

In *Baart* v. *Martin,* 99 Minn. 197, the Court said:

"An examination of the Torrens laws of the different States

> and colonies discloses the fact that those of Minnesota and the Fiji Islands only contain no express exception of cases of fraud. All the original Torrens statutes carefully guard against the possibility of an owner being fraudulently deprived of his property."

The Massachusetts Act allows one year for proof of fraud, "provided no innocent purchaser for value has acquired an interest," in the case of original registration; and the protection of the statute is only extended to "every subsequent purchaser of registered land who takes a certificate of title for value and in good faith;" and "any subsequent registration which is procured by the presentation of a forged duplicate certificate, or of a forged deed or other instrument, shall be null and void."

And the Uniform Land Registration Act as adopted in Virginia, Acts 1916, pp. 70-80, gives no protection to a registered owner,

"(1) In cases of forgery whether or not he be a party or privy thereto.

"(2) In cases of fraud to which he is a party, or in which he is a privy without valuable consideration paid in good faith.'

These illustrations are deemed sufficient to demonstrate this fifth pivotal error, without further citations from the various acts.

The sixth error is found on page 278, in the statement that all the American Torrens Acts "provide that on a transfer of the land from the original registered owner or from some subsequent registered owner, the register shall examine the instrument of transfer and if he is satisfied that the instrument is a proper one and that the transferee or devisee should be registered as owner, he shall issue a new certificate to him."

But the courts have generally held that the registrar does not act as an independent authority, and the quotations from *Tyler* v. *Judges, State* v. *Westfall,* and *Robinson* v. *Kerrigan, supra,* show the thorough inaccuracy of this statement; while the references given to the Uniform Land Registration Act make it plain that the registrar must always act "under the direction of the court."

The seventh error is found on page 279, where the state-

ment is made that the courts have been "content to pass only on the validity of the original registration under a decree in a contested suit, leaving subsequent transfers of the property by the sole act of the registrar entirely out of consideration."

We have already cited and quoted from cases which refute this statement. Our pivotal author is reluctant to admit that even the adjudication for original registration of title is "due process of law." Yet case after case has disposed of that point, and now the chief refuge of opponents of the Torrens System is in the assertion that subsequent registrations are not "due process of law." This is the pivot around which all their arguments now turn—the king-bolt in the chariot of their hopes. But against this assertion and these arguments are opposed, not only the direct authority of the cases in which reference has been expressly made to subsequent registrations, but the implied authority of the long line of cases involving every other conceivable question the ingenuity of counsel has yet been able to raise under the American Torrens Acts. And if there remains any substantial doubt as to "due process of law" in subsequent registrations, why has not the point been taken to the Supreme Court of the United States for final arbitrament? Surely there has been time enough, and opportunity enough, if it had been desired, to pursue this course.

The eighth error is found on page 280, where this statement is made:

> "The purpose and simplicity of the system require that when land once has been registered, the registrar shall administer the act creating the system, and shall make all transfers of land according to his own judgment, without direction or supervision from courts and without notice to interested persons."

This sounds plausible, but is not accurate, as was long ago shown by *Tyler* v. *Judges*. And since the article under discussion was written, its inaccuracy has been further emphasized by the Uniform Land Registration Act. Moreover, as to notice, every person interested is notified, under all the American Torrens Acts, by the requirement for the return of the duplicate certificate whenever a registered title is transferred.

The ninth error is found on page 281, in the statement that

"No state which has passed a Torrens Act has a constitutional provision permitting its legislature to make the registrar a judicial officer." This statement is contradicted by the author himself, on page 282 of his article, by a quotation from the amended Constitution of Ohio. For when these words were written by him the Constitution of Ohio had been amended for that express purpose, by popular vote on September 3, 1912. Also the second Ohio Torrens Act had been passed in 1913 and amended in 1914. And while we are discussing state constitutions, which seem destined to play an important part in the evolution of the Torrens idea in the United States, attention should be called to an amendment of the Constitution of Pennsylvania, which took effect on the 2nd day of November 1915, and reads as follows:

> "Laws may be passed providing for a system of registering, transferring, insuring of and guaranteeing land titles by the State, or by the counties thereof, and for settling and determining adverse or other claims to and interests in lands, the titles to which are so registered, transferred, insured and guaranteed; and for the creation and collection of indemnity funds; and for carrying the system and courts as may be designated by the Legislature, and by the establishment of such new courts as may be deemed necessary. In matters arising in and under the operation of such system, judicial powers, with right of appeal, may be conferred by the Legislature upon county recorders and upon other officers by it designated. Such laws may provide for continuing the registering, transferring, insuring and guaranteeing such titles after the first or original registration has been perfected by the court, and provision may be made for raising the necessary funds for expenses and salaries of officers, which shall be paid out of the treasury of the several counties."

Note the first clause of the last sentence, which is designed to remove all questions in Pennsylvania concerning the competency of subsequent registrations.

The first State to make constitutional provision for Land Registration was Virginia.

The Constitution which went into effect on July 10, 1902, provides as follows:

"Section 100. The General Assembly shall have power to

> establish such court or courts of land registration as it may deem proper for the administration of any law it may adopt for the purpose of the settlement, registration, transfer or assurance of titles to land in the State, or any part thereof."

This provision is much briefer and more general than that of the Pennsylvania Constitution, but it is believed to be sufficient to prevent any questions being raised in Virginia concerning the constitutionality of registrations of title, both original and subsequent.

The tenth error is found on page 283, in the statement that transfers of title are made "without notice to anyone and without opportunity on the part of anyone to be heard." But no transfer can be made without the production of the owner's duplicate certificate, and thus he is given full notice and an opportunity to be heard.

The eleventh error is found on the same page, in the statement that in America "a certificate can not create an indisputable title to land, and though in fact in a given case it may certify the facts correctly, it is not in and of itself conclusive evidence of the facts set forth therein." It is erroneous to say that "a certificate creates title." It is not the certificate, but the judgment of the court that creates the title. The certificate is the evidence of that judgment, and, as we have shown, is as conclusive as the judgment roll. What inherent difficulty is there to prevent a land certificate from being just as conclusive as a stock certificate? The people are determined to have it so, and if there should be anything lacking in the Torrens statutes to make it so, the deficiency will surely be supplied in the evolutionary process of their perfection. Constitutions have not yet been found to stand in the way of the present acts, and having been so often appealed to in vain by their opponents, the presumption is that further appeals will be found equally unavailing.

The twelfth error is found on the same page, in the argument that a judgment in a Torrens proceeding can never be binding on all the world, but must always be limiting to persons actually before the court. This loses sight of the fact that the funda-

mental nature of such a proceeding is that of a proceeding *in rem*. It is not a personal action. Therefore constructive notice is sufficient, and it is competent for the legislature to say how this shall be given. Moreover, the final seizure of the *res* gives notice to all the world, and the period allowed for a hearing and appeal, not only affords due process of law but operates as a statute of limitations and bars all claims not asserted within that time. This period, in the Uniform Land Registration Act, is ninety days, both in cases of original and subsequent registrations. That all the world is charged with notice of a proceeding *in rem,* is illustrated by the opinion delivered by Mr. Chief Justice White in *Goodrich* v. *Ferris,* 214 U. S. 71, in the course of which he said:

> "It is elementary that a probate proceeding by which jurisdiction of a probate court is asserted over the estate of a decedent for the purpose of administering the same is in the nature of a proceeding *in rem,* and is therefore one as to which all the world is charged with notice."

The thirteenth error is found in the last sentence of the article under discussion, on page 285, which reads as follows:

> "The so-called Torrens cases which have arisen in this country do not touch the pivotal points of the system, and a discussion of the Torrens System. in the light of these cases leads nowhere, except to confusion."

Now, the pivotal points are defined on page 274 of this pivotal article as "the registrar and his register." There are twenty-two "so-called Torrens cases" reported in the United States, in which the constitutionality of the "so-called Torrens Acts" has been called in question, and the points made in them have invariably concerned "the registrar and his register." In two of them, the first Illinois Torrens Act and the first Ohio Torrens Act were declared unconstitutional; and in twenty of them, all existing Torrens Acts have been declared constitutional. To what confusion, then, have these decisions led, except to the confusion of the enemies of the Torrens System? Moreover, there are one hundred and five reported decisions in the United States on these so-called Torrens Acts, and in eighty-three of them no constitutional questions have been raised or noted on

the record. To what confusion do these decisions lead, except to the confusion of the critics of the Torrens System? The courts of Illinois have been wearied with constitutional points to such an extent, that constitutional objections raised in *Teninga* v. *Glos,* 261 Ill. 121 were not even noticed by the court in the decision of that case. And the fact that no constitutional questions were raised in the one hundred and five reported cases referred to above, indicates that the bar has realized the futility of such a course. When reduced to its last analysis, the only point made in this pivotal article is that the American Torrens Acts do not afford "due process of law." This is the point that has been interred by every court in every case against the existing acts, but its ghost perpetually haunts the minds of the opponents of the Torrens System. The limits of this paper forbid a discussion of the Federal cases, and we must content ourselves with a bare reference to those which make it plain that no such contention will ever find favor in the Supreme Court of the United States.[3]

Let us not forget the noble and inspiring language of Mr. Justice Matthews in *Hurtado* v. *California*:

> "The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered, and to be gathered, from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail,

---

3. McCormick *v.* Sullivant, 10 Wheat. 202; Murphy *v.* Hoboken Land Co., 18 How. 272; Beauregard *v.* New Orleans, 18 How. 497; Snydam *v.* Williamson, 24 How. 427; Walker *v.* Savannah, 92 U. S. 90; United States *v.* Fox, 94 U. S. 315; Pennoyer *v.* Neff, 95 U. S. 714; Christian Union *v.* Yount, 101 U. S. 352; Ex parte Wall, 107 U. S. 265; Hurtado *v.* California, 110 U. S. 216; Arndt *v.* Griggs, 134 U. S. 31; Holden *v.* Hardy, 165 U. S. 366; Consolidated Rendering Co. *v.* Vermont, 207 U. S. 451; Twining *v.* New Jersey, 211 U. S. 78; Goodrich *v.* Ferris, 214 U. S. 71; Reaves *v.* Ainsworth, 219 U. S. 296. To which may be added a line of cases on "police power" sufficient to sustain the acts, such as Camfield *v.* United States, 167 U. S. 518, and Noble State Bank *v.* Haskell, 219 U. S. 104.

> the ideas and processes of civil justice are also not unknown. * * * There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experience of our situation and system will mould and shape it into new and not less useful forms."

Our friend has been wandering in a maze of his own making. There are many voices without to guide him, if he would but heed them, into the broadening fields of American enterprise, where, from the healthy growth of the law, rich fruits are to be gathered in expanding commerce with lands freed from all feudal bonds and made to serve the multitudinous needs of modern life.

CONCLUSION.

In conclusion let none be discouraged or confounded by attacks on the American Torrens System. It has withstood every assault in the past, and this gives us confidence that it will withstand all assaults in the future. The American Bar should take a pride in bringing it to perfection. Those who dwell in "the land of the free," will never be content until they make land free. This is the ideal of the Torrens System, and it is the ideal of America. The National Conference of Commissioners on Uniform State Laws has, after years of study, drafted the Uniform Land Registration Act; and the American Bar Association has recommended this act for adoption by all the States. Virginia has adopted it, and other States are on the point of doing so. Every lawyer can render a high service to his State, safeguard the homes of the people, and multiply the resources of the country, by taking part in the splendid task of giving to lands a negotiable quality and adding them to the bankable capital of the United States.

EUGENE C. MASSIE.